STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 24, 2006
v	No. 262687 Wayne Circuit Court
WILLIE G. HEARD, Defendant-Appellant.	LC No. 04-011594-01

Before: Fitzgerald, P.J., and Markey and Talbot, JJ.

PER CURIAM.

A jury convicted defendant of felonious assault, MCL 750.82, intentionally discharging a firearm at a dwelling, MCL 750.234b, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, second offense, MCL 769.10, to prison terms of three to six years for the two former convictions and two years for the latter conviction. We affirm.

Trial commenced on March 22, 2005. On that date, the prosecutor presented six witnesses. After defense counsel indicated that he had no further questions on cross-examination of Officer Kozlowski, defendant stated:

> DEFENDANT HEARD: Well, I have one. Could I ask one question? You don't seem to be doing a good enough job. They got a bullet hole in the chair and a bullet hole through him - -
>
> MR. COOK [Defense counsel]: Now, listen - -
>
> DEFENDANT HEARD: The police report said a bullet wind up in the wall. Was it another gun in there? Do they know what gun was that bullet fired from? Because only two came from that one, and the report shows a bullet in the wall.
>
> They showed a bullet in the wall at butt level, at chair level. How did the bullet get in the wall? It didn't go through the chair and through him sitting in the chair. You ain't addressing these issues.

The prosecutor subsequently began redirect examination, and defendant interrupted the officer's testimony regarding his examination of defendant's shotgun:

> DEFENDANT HEARD: Objection! The shotgun was not used!
>
> MR. COOK: Objection. Objection, your Honor.
>
> THE COURT: Objection? What's the basis of the objection?
>
> DEFENDANT HEARD: Objection. The shotgun is irrelevant to this case.
>
> THE COURT: Excuse me.
>
> DEFENDANT HEARD: It was not used.
>
> THE COURT: Excuse me. Mr Cook, what's the objection:
>
> MR. COOK: Nothing, your Honor. I have no objection.

After the jury was excused for lunch, the judge engaged in a discussion with defendant:

> THE COURT: I think you should know that your yelling is only making you look bad to the jury. But if that's what you want to do, you go ahead and keep doing it.
>
> DEFENDANT HEARD: I wasn't yelling.
>
> THE COURT: The other thing - - yes, you did. You yelled several times.
>
> The other thing, you yelled "objection" about this rifle. The rifle is involved because it was taken at the scene because it was in your possession, according to them. . . . Legally, it's admissible. Mr. Heard's objection would have been overruled.
>
> Now, I suggest that you go back there and you talk to your lawyer, and you try and calm yourself down. But if you want to tact up in front of the jury, I'll let them see you, and they'll begin to think that you're a hothead, the kind of person who would take a gun and shoot somebody. . . .
>
> DEFENDANT HEARD: But certain questions ain't being asked, ma'am.

During the cross-examination of investigator Rocha, Rocha testified that the hammer of the shotgun had to be pulled back every time a shot was fired. After defense counsel stated that he had no more questions for Rocha, defendant stated:

> DEFENDANT HEARD: Will you grab the gun and see will it pull - - will it - -

THE COURT: Oh, we can't. Excuse me. You can't do that in the courtroom.

DEFENDANT HEARD: The gun will shoot without cocking it, and nobody wants to demonstrate to the jury if that gun will shoot without cocking it. It make it look like I had to be in control of cocking it every time. That gun will shoot without pulling that trigger back, and nobody will demonstrate.

At the conclusion of Rocha's testimony, and outside the presence of the jury, the court advised counsel that it would not permit any demonstration of a firearm in the courtroom. But the court indicated that the jury could take the unloaded firearm into the jury room and examine it.

The following morning, March 23, 2005, the prosecutor indicated that his only remaining witness, the complainant, was in the hospital and therefore he intended to rest his case. Defense counsel, after consultation with defendant, asked the court to adjourn the case until the complainant was able to testify and be cross-examined by defense counsel. The court agreed to adjourn the trial for a maximum of two months.

Trial resumed on April 6, 2005. Defense counsel stated that he met with defendant the previous night and that defendant was boisterous and indicated that he no longer wanted counsel to represent him. Defendant stated:

I do not wish this man to represent me anymore. He's not doing a job that seems to be in my best interest. He's not objecting to things that the prosecutor has said. He don't cross-examine witnesses.

He was telling me yesterday we're winning the case. Winning the case how? You've got people sitting up here saying the man was shot in the abdomen, when he could better have a person upon the stand like a doctor telling you where he was shot.

I'm charged with attempted murder. Murder is above the waist, and the criteria for that is - -

THE COURT: No, that's not true. Stop talking like that. That's foolish.

DEFENDANT HEARD: It's not?

THE COURT: No, sir. We've had people who bled to death from wounds in the leg. So, don't say it's up above the waist.

Now what else? And you'd better stand up when you talk to me because I'm still a judge.

DEFENDANT HEARD: Oh, I'm sorry. I didn't know.

THE COURT: What else?

DEFENDANT HEARD: And I lose focus when I'm talking. I had an injury over there. I brought that issue to you. I lose focus.

But when the one guy was on - - well, he didn't cross-examine this guy that was on the stand that said that he was driving down the street on Van Dyke, which he would be traveling about 35 miles an hour.

He don't come talk to me about no strategy. When you're driving 35 miles an hour, you're traveling 88 feet per second. And the words stated, "I will kill you," or Mr. Smith said, "I should kill you, M.F.," it only takes a second to say it. If you're 88 feet away, you're not going to hear this.

Mr. Tony Davis had to be a lip reader in order to see this from this distance - - to see this. And it don't have a whole lot to do with the case. But it seems like they're just trying to hook the case up. Let the case represent what the case represents.

They threw extra bullets and .9mm exhibits in this case, and then they retracted them that didn't supposed to have nothing to do with the case. He ain't say nothing about that.

I just feel like I'm not being - - I'm not being represented by this man. I'd rather speak on my own behalf because I know what happened. I was there. And questions I want asked, I think I could - - I don't know the law, but I think I can better ask him and represent myself for the rest of the period of this trial. And if I sink myself, then let it be. At least I'm trying.

THE COURT: I'm going to order that lawyer to stay here and continue this case.

Defendant argues that the trial court erred when it denied his request to represent himself. Generally, we review a trial court's factual findings surrounding a defendant's waiver of his Sixth Amendment right to counsel for clear error. *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004). However, if the ruling involves an issue of law or constitutional question, review is de novo. *Id.*

The right of self-representation is guaranteed by the Michigan Constitution and by statute, but is not absolute. *People v Williams*, 470 Mich 634, 642; 683 NW2d 597 (2004); MCL 763.1. To invoke the right to self-representation, a defendant must waive his right to counsel unequivocally, the waiver must be knowing, intelligent and voluntary, and the court must be satisfied that the defendant will not disrupt, unduly inconvenience or burden the court or the administration of court business. *Id.* Before granting a defendant's request to represent himself, the court must advise the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence, and the risk involved in self-representation. *Id*. at 642-643; MCR 6.005(D)(1). A trial court should not allow a defendant to proceed pro se if the defendant would unduly disrupt the court. *People v Ramsdell*, 230 Mich App 386, 405; 585 NW2d 1 (1998). If a defendant behaves in a disruptive manner and moves to proceed pro se for surreptitious reasons, the court may deny him his right to self-representation. *Id*. at 405-406.

Given the circumstances of defendant's request, we conclude that the trial court did not err in denying his request because allowing defendant to represent himself would have unduly disrupted the proceedings, as evidenced by defendant's continuous interruption of trial with a barrage of meritless objections and ridiculous requests. Additionally, defendant clearly stated that he did not know the law, and legal competence is pertinent to whether self-representation will unduly inconvenience or burden the court. While the trial court did not engage in the requisite on-the-record colloquy, a court may deny a request for self-representation if it determines that the proceeding will thereby be disrupted. It is apparent from the trial court's colloquy with defendant that this is precisely the reason for the trial court's ruling. Further, only one other witness and defendant testified after the court denied defendant's request. Under these circumstances, we conclude that the trial court did not commit error requiring reversal when it denied defendant's request to represent himself in the final stage of his trial.

Defendant next argues that there was insufficient evidence presented at trial to support his convictions. We review sufficiency of the evidence claims de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). When reviewing a claim that the evidence was insufficient to support the defendant's conviction, we review the evidence presented in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crimes charged were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). Additionally, we afford deference to the trier of facts special opportunity and ability to determine the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992).

The elements of felonious assault are: (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. MCL 750.82; *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). And if an individual intentionally discharges a firearm at or in a structure that he knows or has reason to believe is a dwelling or occupied structure, he is guilty of intentionally discharging a firearm at a dwelling. MCL 750.234b.

Here, the victim testified that he fell asleep in a chair in a restaurant's office shortly after having an argument with defendant. He awoke when he heard a gunshot and felt some pressure. He looked up and saw defendant standing in the doorway with a gun in each hand. The victim realized that he had been shot when he stood up and the buttocks area of his pants was wet. Defendant shot the victim in the thigh as the victim attempted to leave the building, and defendant threatened to "blow the victim's brains out" once the victim had left the building. The victim testified that he did not have a gun on his person during the incident, nor did he ever threaten defendant during the incident. Additionally, officers Kozlowski and Davis testified that they saw defendant holding a gun in each hand while standing over the victim, and Davis testified that he heard defendant tell the victim as he stood over the victim, "I told you I was going to . . . kill you." Officer Rocha testified that the handgun that was taken from defendant at the scene had to have its hammer manually pulled back each time that a shot was fired. Defendant acknowledged that he told the 911 operator, "I just went off the deep end and shot him." Viewing the evidence presented in a light most favorable to the prosecution, we conclude

that a rational trier of fact could have found that the essential elements of felonious assault and intentionally discharging a firearm at a dwelling were proven beyond a reasonable doubt. *Avant, supra* at 505. The evidence was sufficient evidence to support defendant's felonious assault and intentionally discharging a firearm at a dwelling convictions. *Johnson, supra* at 723. The evidence was also sufficient to allow a rational trier of fact to find that defendant possessed a firearm during the commission of, or the attempt to commit, a felony.

Defendant next argues that he was denied his constitutional right to the effective assistance of counsel. Defendant failed to making a motion for a new trial or requesting an evidentiary hearing before the trial court, and therefore our review is limited to the facts contained in the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

We reject defendant's argument that he was denied his constitutional right to the effective assistance of counsel when his trial counsel failed to move for a mistrial on the ground that the victim was unable to testify on the second day of trial or, in the alternative, to move for a mistrial on the ground that the two week adjournment that was granted by the trial court prejudiced defendant because it caused the jurors' memories of prior testimony to fade. A mistrial should be granted only because of an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). Furthermore, a trial court does not abuse its discretion when it grants an adjournment on the basis of a witness's unavailability if it is established that the unavailable witness's testimony is material and the prosecution duly attempted to locate the witness. MCR 2.503(C)(2); *People v Grace*, 258 Mich App 274, 276-278; 671 NW2d 554 (2003).

Here, in relevant part, the prosecutor announced on the second day of trial that the victim would not be able to testify because he had recently entered the Detroit Receiving Medical Center Crisis Unit to receive treatment for convulsions and paranoia. The prosecution then explained to the trial judge that it would rest its case. Defense counsel subsequently asked the trial court if the court would instruct the jury that the victim's absence "should be taken in the light most favorable to [defendant]." The trial court denied defense counsel's request for the instruction on the ground that the prosecution "had done everything that is possible, including finding [the victim] and discovering that he is in the hospital." Defense counsel subsequently requested that court be adjourned until the victim was able to testify so that defendant could have an opportunity to cross-examine the victim. The trial court granted defendant's request. Since the prosecution provided proof of why it could not get the victim to come in and testify, and the trial court denied defense counsel's request to have the jury instructed that the victim's absence "should be taken in the light most favorable to" defendant, we conclude that defense counsel's performance did not fall below an objective standard of reasonableness when he abstained from making a motion for a mistrial on the ground that the victim was not able to testify on the second day of trial. *Alter, supra* at 205. Furthermore, given the fact that defendant requested the adjournment, and the trial court properly granted defendant's request, *Grace, supra* at 276-278, it

would have been futile for defense counsel to move for a mistrial on the ground that the two-week adjournment that was granted by the trial court prejudiced defendant. *Alter, supra* at 205. Defendant's argument is without merit.

Defendant also argues that his trial counsel failed to listen to the 911 tape before trial. Defendant has failed to establish what defense counsel could have done differently if he had heard the tape before trial, and how such preparation would have affected the outcome of the proceedings. Therefore, defendant has failed to establish how defense counsel's inactions in this regard prejudiced him and, accordingly, defendant's argument in this regard fails. *Toma, supra* at 302-303.

Finally, defendant argues that the prosecutor's failure to provide him with a copy of the 911 tape before trial denied him his right to a fair and impartial trial. We review claims of prosecutorial misconduct on a case-by-case basis to determine whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001); *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999).

Here, the record suggests that the prosecution never disclosed the 911 tape concerning defendant's call to 911. However, the record reflects that the 911 tape containing defendant's statements to the 911 operator was neither favorable to defendant nor exculpatory and did not contain false information. Furthermore, defendant, having admittedly made the statements contained on the 911 tape, had knowledge of the evidence independent of discovery. *People v Taylor*, 159 Mich App 468, 487-488; 406 NW2d 859 (1987). Consequently, there is no indication that the prosecutor suppressed evidence favorable to defendant, or that there was a reasonable probability that the outcome of the proceedings would have been different had the prosecutor turned over the 911 tape before trial. Thus, the prosecutor's failure to provide defendant with a copy of the 911 tape before trial did not implicate defendant's due process rights, and furthermore, even if the prosecutor's actions did implicate defendant's due process rights, the prosecutor's actions in this regard would not require reversal. *People v Harris*, 261 Mich App 44, 49; 680 NW2d 17 (2004); *People v Tracey*, 221 Mich App 321, 324; 561 NW2d 133 (1997). Accordingly, the prosecutor's failure to provide discovery of the 911 tape did not deny defendant of his right to a fair and impartial trial.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Michael J. Talbot